TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 31

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1932

CERTIORARI GRANTED MAY 16, 1932

(36,655)

(36,655)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 31

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, DECEASED. PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1932

[1*] DOCKET No. 32,763.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES:

For Petitioner: FRANK I. FORD, Esq.

For Respondent: F. B. HORNER, Esq.

DOCKET ENTRIES.

1927.

Dec. 7—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 8—Copy of petition served on General Counsel.

1928.

Feb. 6—Answer filed by General Counsel.

Feb. 9—Copy of answer served on taxpayer—Circuit Calendar.

1930.

Mar. 15—Hearing set May 26, 1930, San Francisco, Calif.

May 21—Hearing had at San Francisco, Calif., before H. F. Seawell, Division 4, on motion. Stipulation filed. Briefs due in 90 days.

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*Page-number appearing at the top of page of original certified Transcript of Record.

July 9—Transcript of hearing of May 20, 1930, at San Francisco, Calif., filed.

July 19—Brief filed by General Counsel.

July 26—Brief filed by taxpayer.

Sept. 30—Findings of fact and opinion rendered—H. F. Seawell, Division 4. Judgment will be entered for respondent.

Sept. 30—Decision entered—H. F. Seawell, Division 4.

1931.

Mar. 28—Supersedeas bond for $1500.00 approved and ordered filed.

Mar. 28—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Apr. 13—Proof of service filed.

Apr. 20—Praecipe filed by taxpayer.

Apr. 25—Proof of service of praecipe filed.

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[2] Filed December 7, 1927. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter MT-ET-3660-JPB Calif., dated October 12, 1927, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with a principal office at American Trust Bldg., Petaluma, Calif.

2. The deficiency letter (a copy of which is attached) purports on its face to have been mailed to the taxpayer on October 12, 1927.

3. The taxes in controversy are estate taxes claimed to be accruing on October 5, 1924, and determined under the Revenue Act of 1924, and are less than $10,000.00, to wit:

Deficiency in tax	$ 719.61
Refund claimed	2172.16

4. The determination of taxes contained in the said deficiency letter is based upon the following errors:

[3] (a) The Commissioner of Internal Revenue has determined the gross estate at $287,858.71; the deductions $124,799.79; and the net estate $163,058.92, the tax upon the transfer of which is $2,891.77. The return prepared by Commissioner Agent shows a tax of $2,171.16, and a further deficiency is now claimed in the sum of $719.61.

(b) The Commissioner of Internal Revenue was without authority under the Revenue Act of 1924 to prepare a delinquent return and subject this estate to tax. The Act of 1924 is unconstitutional

in so far as it attempts to tax property, all interest in which the decedent created and transferred prior to the passage of the Revenue Act of 1924 and 1916.

(c) The joint tenacy of M. A. Gwinn and J. H. Gwinn was created in June of 1915 prior to the enactment of Revenue Acts of 1916 and 1924, and there is no taxable transfer on the succession of a joint tenant to property. Each tenant is seised of the whole estate from the first (June of 1915), and no change occurs in his title on the death of his cotenant.

5. The facts upon which the taxpayer relies as to the basis of his appeal are as follows:

(a) Taxpayer did not file a return form 704 or 706 with reference to the property held in joint tenacy by the said M. A. Gwinn (decedent) with J. H. Gwinn for the reason that he was advised by his attorney and by his tax advisor that inasmuch as the joint tenacy in question was created in June, 1915, which time was prior to the enactment of the [4] Revenue Acts of 1916 and 1924 that no return or report was required to be filed. The Revenue Act of 1924 is unconstitutional in so far as it attempts to tax property all interest in which the decedent created and transferred prior to the passage of the Revenue Acts of 1924 and 1916.

(b) For the further reason that both at common law and under the Civil Code of California the legal effect of a joint tenacy is that the title to a joint tenacy does not pass to and vest in the survivor upon the death of his cotenant, but that each tenant is seised of the whole estate from the first, and no

change occurs in his title on the death of his co-tenant.

(c) That, furthermore, taxpayer had terminated the joint ten*a*cy under the laws of the State of California in a proceeding taken in the Superior Court of the State of California, in and for the County of Sonoma, and had secured the certificate of the State Inheritance Appraiser to the effect that no tax was due because of the date of the creating of the joint ten*a*cy antidating the statute.

WHEREFORE, the petitioner prays that this board may hear and redetermine the deficiency herein alleged and to also determine the amount of tax refund due petitioner.

FRANK I. FORD.
FRANK I. FORD,
Counsel for Petitioner, 526–7 Mills Building, San Francisco, Calif.

[5] State of California,
County of Sonoma,—ss.

Personally before me appeared J. H. Gwinn, Beneficiary, Estate of M. A. Gwinn, who stated that he had read the foregoing petition and that the statements therein are true.

(Signed) J. H. GWINN.

Subscribed and sworn to before me this 1st day of December, 1927.

(Signed) W. T. MOONEY,
Notary Public in and for the County of Sonoma, State of California.

[6] Treasury Department,
Washington.
October 12, 1927.

MT-ET-CL.-3660-JPB.
District of 1st California.
Estate of M. A. Gwinn.
Date of Death—October 5, 1924.
Deficiency Tax—$719.61.
J. H. Gwinn, Beneficiary,
Estate of M. A. Gwinn,
Petaluma, California.

Sir: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of Nov. 10, 1926. The deficiency hereby determined amounts to $719.61, and is fully explained in the attached statement, consisting of one page, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of

Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner.

Enclosures:
Statement.
Waiver—Form 890.

[7] MT-ET-Cl.-3660-JPB.
District of 1st California.
Estate of M. A. Gwinn.

The basis of the protest is the alleged unconstitutionality of the Revenue Act of 1924.

As the functions of the Bureau are administrative, the revenue acts must be administered as enacted. Your protest is accordingly rejected in its entirety.

In view of the foregoing, the gross estate is unchanged at $287,858.71; the deductions are $124,799.79, and the net estate is $163,058.92, the tax upon the transfer of which is $2,891.77. As the return shows a tax of $2,172.16, the deficiency is $719.61.

There will be assessed and collected, interest on the deficiency at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

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[8] Filed Feb. 6, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 32,763.

Estate of M. A. GWINN, J. H. GWINN, Beneficiary,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his at-

torney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

4. Denies that the respondent, in determining the deficiency tax, committed error as alleged in the paragraph of the petition numbered 4.

5. Denies the allegations contained in the paragraph of the petition numbered 5.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

[9] WHEREFORE it is prayed that the determination of the Commissioner be approved.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
FRANK T. HORNER,
Special Attorney,
Bureau of Internal Revenue.

FTH/y.
2-2-28.

[10] A true copy.

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

20 B. T. A. ——.

United States Board of Tax Appeals.

DOCKET No. 32,763.

Promulgated September 30, 1930.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

A decedent and her son held property in California as joint tenants since before the Federal estate tax, the decedent dying October 5, 1924. In the circumstances of the instant case and under the applicable provisions of the Revenue Act of 1924, subdivisions (e) and (h) of section 302, *held,* the respondent in computing estate tax committed no error in including one-half the value of the joint estate in the gross estate of the decedent.

FRANK I. FORD, Esq., for the Petitioner.

FRANK T. HORNER, Esq., for the Respondent.

The respondent determined a deficiency in estate tax of $719.61, due to his including in the gross estate of the decedent, Mrs. M. A. Gwinn, one-half of the value of certain property owned by her and her son, J. H. Gwinn, as joint tenants.

The case is submitted on the pleadings and stipulation.

FINDINGS OF FACT.

The petitioner is an individual having his principal office in Petaluma, Cal., of which town the decedent and petitioner were both residents.

[11] The deficiency notice dated and mailed to petitioner October 12, 1927, from which this appeal was taken, was addressed to "J. H. Gwinn, Beneficiary, Estate of M. A. Gwinn, Petaluma, California." J. H. Gwinn is such beneficiary and in actual or constructive possession of the property of the said M. A. Gwinn, who died October 5, 1924.

The gross estate of decedent for Federal estate tax purposes in 1924 as determined by the respondent was $287,858.71; the total deductions allowed in determining the deficiency amounted to $124,799.79; the net estate determined was $163,058.92; the total estate tax determined was $2,891.77, and the return filed for the estate showed a tax liability of $2,172.16, which about March 18, 1927, together with interest thereon of $377.78, was paid.

The respondent determined the value of all the property held as joint tenants by the decedent and the petitioner and then included in the gross estate of the decedent as subject to the Federal estate tax half of the property so held by the two as joint tenants aforesaid, allowing deductions as heretofore stated, and computing the tax on the net estate so determined in accordance with the rates prevailing in the applicable acts, no effort being made to

include anything other than the decedent's half of the total estate held in joint tenancy.

The interest of the decedent in the property, the value of which interest was included in the gross estate of the decedent for Federal estate tax purposes by the respondent, was held by the decedent by virtue of the creation in June, 1915, of an estate in joint tenancy [12] between the decedent and her son, J. H. Gwinn, with the right of survivorship and not as tenants in common, and the decedent and her son contributed equal amounts of property to the said estate in joint tenancy created by them in 1915.

It is agreed between the petitioner and respondent that if the Board determines that property held by the decedent and her son as joint tenants with right of survivorship and not as tenants in common, even though both of the joint tenants contributed equally from their separate estates to the acquisition of the property held as joint tenants, is not subject to the applicable provisions of the Revenue Act of 1924 imposing the Federal estate tax, then there is no deficiency in the estate tax in this case and there has been an overpayment of $2,172.16 principal and $377.78 interest; that if the Board determines that the value of property held by this decedent and her son as joint tenants is subject to the Federal estate tax under applicable provisions of the Revenue Act of 1924 imposing the estate tax, then there is no overpayment of estate tax and in addition thereto there is a deficiency in the estate tax in this case in the amount of $719.61; provided,

however, that both parties to this case reserve all rights to contest by appropriate proceedings in the Court of Appeals the correctness of the determination and decision of the Board in this case.

[13] OPINION.

SEAWELL.—The applicable provisions of the Revenue Act of 1924 are contained in section 302 (e) and (h) and are as follows:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.—
>
> * * * * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or

money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercising, or relinquished before or after the enactment of this act.

[14] The petitioner cites and relies on the case of In re Gurnsey's Estate, 177 Cal. 211, 170 Pac. 402, holding that under the Civil Code of California, as at common law, the legal effect of a joint tenancy is that the title to the joint property does not pass to and vest in the survivor upon the death of the cotenant, but that each is seized of the whole estate from the first and no change occurs in his title on the death of his cotenant.

That case was cited and approved in Carter vs. English, 15 Fed. (2d) 6, and this Board, in Laura F. M. Doe et al., Executors, 18 B. T. A. 427, and Lizzie S. Mastick, 18 B. T. A. 428, was constrained by Carter vs. English, *supra,* to hold that property in California held by a decedent and his wife in joint tenancy since before the estate tax is not included in decedent's gross estate for estate tax purposes.

The case of Carter vs. English, *supra,* arose under the Revenue Act of 1916, and the said two cases before this Board arose under the Revenue Act of 1918. All were from the state of California and involved substantially the same question as that in the instant case which, however, arises under the Revenue Act of 1924. In all of the cases the joint tenancies involved were created, and the titles of the decedents, whose estates were sought to be taxed, were vested, prior to the enactment of the applicable Revenue Act, but not until the Revenue Act of 1924 was there a retroactive feature in any of the Acts as regards the imposition of an estate tax in such cases.

[15] In the instant case, the property involved and held as joint tenants by the decedent and her son, the petitioner herein, was acquired as joint tenants by them in June, 1915, each contributing equal amounts of property to the said estate in joint tenancy. However, no effort is now being made to include anything other than one-half of the value of the total estate held in joint tenancy.

The decedent died October 5, 1924, at which time

the Revenue Act of 1924 was in effect, and under subdivision (h) of section 302 thereof subdivision (e) of section 302 is made specifically retroactive, which brings within the terms of the Act the value of the decedent's interest in the joint estate, regardless of when the joint tenancy was created. In the instant case the tenancy, as heretofore stated, was created in June, 1915, and the value of the decedent's interest in the jointly owned property must be included in her gross estate for purposes of the estate tax, unless the provisions of the Act, when applied to the facts in the instant case, are held unconstitutional.

The respondent, however, does not rely solely upon the specific language of section 302 (e) and (h) of the Revenue Act of 1924 but also upon the decision of the Supreme Court of the United States in Tyler vs. United States, —— U. S. —— (decided May 19, 1930), in which styled case the Court had before it three cases involving the liability for Federal estate tax purposes of property held by the decedent and surviving spouse as tenants by the entirety. In all three [16] cases the Court held the property was subject to the Federal estate tax.

In the Tyler case, *supra,* and the other two cases decided at the same time, the Court points out that the estate by the entireties was created after the passage of the act levying the tax. The Court stated:

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the

> decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

The Court also states that while the survivor had an estate prior to the death of the cotenant, death had the effect of passing to the survivor substantial rights in respect of the property theretofore never enjoyed. "Thus the death of one of the parties to the tenancy became the 'general source' of important and definite accessions to the property rights of the other."

It is true, in the Tyler and other two cases referred to, *supra,* the Supreme Court had under consideration provisions of the Revenue Acts of 1916 and 1921 relative to the impostion of estate tax upon estates by the entirety, whereas here the issue is as to the imposition of an estate tax, under the Revenue Act of 1924, on the interest of a decedent in a joint tenancy created before the passage of the 1924 Revenue Act, the facts in the instant case bringing it squarely within the retroactive provisions of said Act.

[17] There is no substantial difference between the earlier revenue acts mentioned and the Revenue Act of 1924, with respect to joint estates, except that the 1924 Act is specifically retroactive.

The Supreme Court in the Tyler case, *supra,* ap-

pears to have definitely settled the constitutionality of such parts of the revenue acts as impose an estate tax, and since, as therein stated, "the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other," the same basis and occasion for the tax would seem to exist whether the estate in joint tenancy was created before or after the effective date of the revenue act which imposes the tax.

In view of the specific provisions of section 302 (e) and (h) of the Revenue Act of 1924 and the language and reasoning of the Court in its opinion in the Tyler case, *supra,* from which we have only briefly quoted, though much of the reasoning is applicable here, we have no hesitancy in assuming, which in the circumstances of the instant case it is our duty to do, that the Revenue Act of 1924 and its retroactive provisions are constitutional. In the light of the reasoning in the Tyler case, *supra,* and the decision of the Court in Knox et al. vs. McElligott, 258 U. S. 546, we are of the opinion, on the record in the instant case, that the respondent in his determination of a deficiency in estate tax of $719.61 committed no error and his action is accordingly approved.

Judgment will be entered for the respondent.

[18] United States Board of Tax Appeals,
Washington.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion, promulgated September 30, 1930,—

IT IS ORDERED AND DECIDED: That there is a deficiency of $719.61 in estate tax.

Entered Sep. 30, 1930.

(Signed) H. F. SEAWELL,
Member, United States Board Tax Appeals.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

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[19] Filed March 28, 1931. U. S. Board of Tax Appeals.

United States Circuit Court of Appeals for the Ninth Circuit.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR THE REVIEW OF AND APPEAL FROM DECISION OF UNITED STATES BOARD OF TAX APPEALS.

Comes now J. H. Gwinn, Beneficiary of the Estate of M. A. Gwinn, the petitioner above named, and herewith makes and enters his petition for the review of, and appeal from the findings, judgment and decision of the Board of Tax Appeals promulgated on the 30th day of September, 1930, in the case bearing the above caption before the United States Board of Tax Appeals, under Docket No. 32,763, and in support of this petition, alleges as follows, to wit:

First.

The nature of the controversy before the Board of Tax Appeals was the determination of estate taxes claimed to be accruing on October 5, 1924, and determined under the Revenue Act of 1924, to wit: Deficiency in tax of $719.61. (Refund claimed by petitioner $2,172.16.)

This involves the question whether a joint ten-

ancy credited in June. 1915, prior to the passage of the Revenue Act of 1916 and the [20] Revenue Act of 1924, is subject to estate taxes under the applicable provisions of the Revenue Act of 1924, subdivision (e) and (h) of Section 302.

All of the facts in the case at bar have been stipulated, and the findings of fact set forth in paragraphs 1 to 6, inclusive, of the findings of fact of the Board of Tax Appeals, are practically the same as the facts stipulated by counsel for petitioner and counsel for the Commissioner and filed with the Board of Tax Appeals.

Second.

That the petitioner seeks to review and appeal from the findings, judgment and decision of the Board of Tax Appeals in and to the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue to whom said petitioner made the estate tax return.

Third.

ASSIGNMENTS OF ERROR.

The errors committed by the Board of Tax Appeals upon which the petitioner relies as a basis for this petition and relies as a basis for this petition and appeal are as follows:

(1) The Board of Tax Appeals erred in upholding the Commissioner of Internal Revenue, respondent herein, in his determination of a deficiency in the amount of $719.61 in the estate taxes of the petitioner under the Revenue Act of 1924.

(2) The Board of Tax Appeals erred in holding that where a joint tenancy is created in June of 1915 prior to passage of the Revenue Act of 1916 1924, the value of the decedent interest in jointly owned property upon her death on October 5, 1924, must be included in her [21] gross estate for purposes of estate tax under the Revenue Act of 1924.

(3) The Board of Tax Appeals erred in holding that under subdivision (h) of Section 302 thereof, subdivision (e) of Section 302 is specifically retroactive regardless when the joint tenancy is created.

(4) The Board of Tax Appeals held in its opinion in the instant case following Carter vs. English, 15 Fed. (2d) 6, which arose under the Revenue Act of 1916, that joint tenancies and the titles of the decedents whose estate were sought to be taxed, created before the passage of the applicable act, were vested, but erred in holding that the retroactive feature of the Revenue Act of 1924 could destroy this vested right of petitioner.

(5) The Board of Tax Appeals erred in following the case of Tyler vs. United States, 281 U. S. 497, as in that case the court distinctly states in Paragraph 5 of the opinion that "in each case the estate was created after the passage of the applicable act; and none of the property constituting it had, prior to its creation, ever belonged to the surviving spouse."

Whereas in the instant case the joint tenancy was created prior to the passage of the Revenue Act of

1916 and 1924, and the Board of Tax Appeals erroneously concludes that the same basis and occasion for the tax would seem to exist whether the joint tenancy was created before or after the effective date of the Revenue Act which imposes the tax.

(6) The Board of Tax Appeals erred in holding the retroactive [22] features of subdivision H of Section 302 of the Revenue Act of 1924 constitutional in so far as it requires that there shall be included in the gross estate under Section 302, (e) R. A. of 1924, the value of property transferred by decedent prior to the passage of the Revenue Acts of 1916 and 1924.

(7) The Board of Tax Appeals erred in rendering the decision for the respondent.

WHEREFORE your petitioner prays that this Honorable Court may review the findings, judgment and decision in this cause, reverse the decision of said Board of Tax Appeals in favor of petitioner that there is no deficiency in estate taxes under the Revenue Act of 1924 and a refund is due petitioner for estate taxes paid in the sum of $2,-172.16, and that this joint tenacy is not subject to the applicable provision of the Revenue Act of 1924, Section 302, subdivision (e) and (h), and for such other and further relief as may to this Court appear proper in the premises.

FRANK I. FORD,
FRANK I. FORD,
Attorney for Petitioner.

[23] State of California,
County of Sonoma,—ss.

J. H. Gwinn, being first duly sworn according to law, upon oath deposes and says that he is the petitioner in the foregoing petition; that he has read the foregoing petition, knows the contents thereof and that the allegations of fact therein are true to the best of his knowledge, information and belief, and that this petition is not filed for purposes of delay and he believes that the petitioner is fully entitled to the relief sought.

J. H. GWINN. (Signed)

Subscribed and sworn to before me this 20 day of March, 1931.

ROBERT A. DOUGLAS, (Signed)
Notary Public in and for the County of Sonoma, State of California.

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[24] Filed Apr. 13, 1931. U. S. Board of Tax Appeals.

United States Circuit Court of Appeals for the Ninth Circuit.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF FILING PETITION FOR REVIEW.

General Counsel, Bureau of Internal Revenue,
Washington, D. C.

You are hereby notified that on March 27, 1931, a petition for review of the decision of the United States Board of Tax Appeals was filed with the Clerk of the Board in the above-entitled case, and a true copy of said petition is hereby served upon you.

(Signed) FRANK I. FORD,
Attorney for Petitioner.

Receipt acknowledged this 27th day of March, 1931, of the above notice and copy of the petition for review.

(Signed) C. M. CHAREST,
Attorney for Respondent.

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[25] Filed April 25, 1931. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare the transcript of the record in this cause to be transmitted and delivered by you to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript, and certify as correct, copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. The pleadings before the Board.
3. Findings of fact and the opinion of the Board.
4. Decision (order of redetermination).
5. Petition for review.
6. Notice of filing petition for review.
7. This praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) FRANK I. FORD,
Attorney for Petitioner.

Receipt acknowledged this 24th day of April, 1931, of the above praecipe for transcript of record.

(Signed) C. M. CHAREST,
Attorney for Respondent.

[26] DOCKET No. 32,763.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CERTIFICATE OF CLERK U. S. BOARD OF TAX APPEALS TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 25, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of May, A. D. 1931.

[Seal] B. D. GAMBLE,

Clerk.

[Endorsed]: No. 6489. United States Circuit Court of Appeals for the Ninth Circuit. J. H. Gwinn, Beneficiary of the Estate of M. A. Gwinn, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed June 11, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6489

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED petition to review argued by Mr. Frank I. Ford, counsel for the petitioner, and by Mr. Erwin N. Griswold, Special Assistant to the Attorney General, counsel for the respondent, and submitted to the court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fifth day of January, in the year of our Lord one thousand nine hundred and thirty-

two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before WILBUR and SAWTELLE, Circuit Judges, and JAMES, District Judge.

JAMES, District Judge.—By this proceeding there is brought here for review a decision of the Board of Tax Appeals, wherein it was determined that one-half of the value of certain real property, held by M. A. Gwinn and petitioner in joint tenancy at and prior to the death of M. A. Gwinn, was sub-

ject to an estate or succession tax under the provisions of the Revenue Act of 1924, approved June 2, 1924 (43 Stat. 303). The joint tenancy was created in June, 1915. Petitioner and M. A. Gwinn, his mother, contributed equal amounts to the purchase of the property. M. A. Gwinn died October 5, 1924. The Revenue Act provides (Sec. 302, subdiv. (e)) that the estate tax shall be determined by including:

> " * * * the extent of the interest therein held as joint tenants by the decedent and any other person * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: Provided, that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person * * * ".

By subdivision (h) of the same section, the provisions quoted are made to apply to all rights and interests,

> "whether made, created, arising, existing, exercising, or relinquished before or after the enactment of this act."

Two questions arise: (1) At the death of his cotenant, did petitioner, by reason of such demise, succeed to or acquire any additional right or interest in the property theretofore held in joint tenancy in 1915? (2) Did the fact that the joint tenancy was created prior to the adoption of the Act of 1924, relieve it from taxation?

The decision of this court in Carter vs. English, 15 Fed. (2d) 6, is relied upon by petitioner as complete authority sustaining his contentions. Carter vs. English took as the ground of decision, that the California Supreme Court had, in Estate of Gurnsey, 177 Cal. 211, held that a joint tenant took his whole estate at the time of the conveyance and no interest could be taxed under a law passed after the creation of the tenancy; that the estate had completely vested prior to the date of the law. While we think that the decision has been completely overturned by later decisions of the Supreme Court of the United States which are hereinafter cited and quoted from, it seems proper to consider just what limitations, if any, the California Statute has placed upon a joint tenancy interest. The California Supreme Court in the Gurnsey case held that

> "each tenant was seized of the whole estate from the first, and no change occurred in his title on the death of his cotenant."

Section 683, Civil Code of California, in defining joint tenancy, makes no change in the character, attributes or incidents which the common law assigned that species of property holding. The unities of title, interest and possession remain affixed. Under

the common law, one of such tenants had not the right to the exclusive possession of the property, and that right accrues to him only upon the death of his cotenant, and his cotenant might destroy the joint tenancy during his lifetime by transfer of his interest; he could also cause partition of the property to be decreed in proportion to interests. Mr. Kent, in his Commentaries (Vol. 4, page 360, 14th Ed.), treating of the subject of joint tenancy, says:

> "A joint tenant in respect to his companion is seized of the whole; but for the purposes of alienation * * * he is seized only of his individual part or proportion."

In Green vs. Skinner, 185 Cal. 435, it is said:

> "It is the law that a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share."

The California court in the Gurnsey case made an important reservation in its holding when it said:

> "The statement in McDougald vs. Boyd, 172 Cal. 753, that the Act of 1911 did not undertake to impose such tax upon the 'right accruing to a surviving joint tenant under the death of his cotenant' is, in our opinion correct."

It is made very plain that the California courts do not view a joint tenancy as conferring upon each tenant complete and irrevocable rights in the joint estate from the date of the inception of the relation. Rights not theretofore possessed must then accrue to the survivor upon the death of his cotenant.

In Tyler vs. United States, 281 U. S., the Supreme Court, under facts there considered, interpreted the purpose and effect of the Federal estate tax law. In that decision the court said:

> "If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.
>
> "The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. * * *
>
> "Before the death of the husband, the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because

of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

The court decided that the Fifth Amendment was not violated as the tax was not so arbitrary and capricious as to amount to confiscation or deprivation of the property without due process of law.

Chase National Bank vs. United States, 278 U. S. 327, had to do with the application of the Federal law imposing an estate tax upon the interest of beneficiaries in insurance policies at the death of the insured. The court held that as the assured retained a right under the policies during his lifetime to surrender and cancel the policies, or pledge them as securities for loans, and otherwise dispose of them for his own benefit, the interest of the beneficiaries becoming for the first time subject to appropriation by them at the death of the assured, the policies should be included among the estate assets and taxed.

In Klein, Administratrix, vs. United States, 283 U. S. 231 (Advance Sheet No. 2), the court was considering an interest, upon which an estate tax was

claimed, arising under a qualified deed given by the husband, decedent, to his wife, and it was there said:

> "It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the later estate into being for the grantee, and effected its transmission from the dead to the living to satisfy the terms of the taxing act and justified the tax imposed."

In Y. M. C. A. vs. Davis, 264 U. S. 47, referring to the estate tax imposed by the Revenue Act of 1918, we find the following expressions of the Supreme Court:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, *but the interest which ceased by reason of the death.*" (Italics supplied.)

The case of Nichols vs. Coolidge, 274 U. S. 531, is not in point, as the facts there considered showed an unrestricted and absolute transfer of property prior to death of a decedent, with no interest, qualified or otherwise, retained by the grantor. There was later considered by the Supreme Court of the United States the effect of the same trust deed involved in the case just cited. Coolidge vs. Long, 282 U. S. 582, and the court there observed:

"* * * The settlers divested themselves of all control over the principal; they had no power to revoke or modify the trust. Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen."

When petitioner's mother died, the interest which she had in the property held in joint tenancy (that interest was a real interest subject, during her lifetime, to be transferred or otherwise terminated), ceased by reason of her death and only because of that event. Hence it was taxable. The interest of petitioner accrued by reason of the event of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy. There is, therefore, present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924. The order is affirmed.

[Endorsed]: Opinion. Filed Jan. 5, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6489.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT U. S. CIRCUIT COURT OF APPEALS.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court, that the order of the said Board of Tax Appeals in this cause be and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered Jan. 5, 1932. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-third day of February, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of petitioner, filed February 1, 1932, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Frank I. Ford, counsel for the petitioner, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 1, 1932; and in the event the petition for a

writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, February 24, 1932.

[Endorsed]: Filed Feb. 24, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-two (42) pages, numbered from and including 1 to and including 42, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of March, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 16, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.